Supreme Court, U. S.
FILED
OCT 4 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 73-1788

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION,
FOR THE USE AND BENEFIT OF
LIBERTY MUTUAL INSURANCE COMPANY,
AND
OLD REPUBLIC INSURANCE COMPANY,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

James L. Sandberlin
Alexander M. Slaughter
Robert E. Payne
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

Counsel for Petitioner, Pitt County Transportation Company

TABLE OF CONTENTS

Page

CORRECTION OF ERROR 1

ARGUMENT IN REPLY TO BRIEF IN OPPOSITION 2

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF CITATIONS

Cases

Alford v. Major, 470 F.2d 132 (7th Cir. 1972) 3, 4, 5, 7, 9, 10, 11, 12

Alford v. Major, 314 F.Supp. 314 (N.D. Ind. 1970) 9

American Trucking Ass'ns. v. United States, 344 U.S. 398 (1953) 6, 7

Carolina Freight Carriers Corp. v. Pitt County Trans. Co., 492 F.2d 234 (4th Cir. 1974) 4

Statutes

49 U.S.C. § 304(a)(3) 6

49 U.S.C. § 304(e) 6

Regulation

49 C.F.R. § 1057.4(a)(4) 4

In The

Supreme Court of the United States

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION,
FOR THE USE AND BENEFIT OF
LIBERTY MUTUAL INSURANCE COMPANY,
AND
OLD REPUBLIC INSURANCE COMPANY,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

CORRECTION OF ERROR

Pitt County hereby advises the Court of an erroneous statement in the Petition for a Writ of Certiorari previously filed herein:

At page 4 of the Petition for a Writ of Certiorari, Pitt County is described as an intrastate carrier. Counsel has recently been advised that this statement is inaccurate, though not materially so. Counsel has been advised that, at all times pertinent to this case, while Pitt County was not a generally authorized interstate carrier, it did possess limited authorization to transport goods in interstate commerce. Pitt County's authorization was limited to the fol-

lowing: (a) authority to transport shipments of fertilizer and fertilizer materials originating from Norfolk, Portsmouth or Suffolk, Virginia to points in North Carolina; (b) authority to transport shipments of farm drain tile pipe and fittings originating from Milledgeville, Georgia and Richland County, South Carolina to points in that part of North Carolina on, and east of, United States highway number one; and (c) authority to transport shipments of flakeboard originating from Farmville, North Carolina to points in Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, eWst Virginia and the District of Columbia.

The Trip Lease, which was incorporated by reference in the pleadings, establishes that the operation of the equipment in this case was for the purpose of transporting a shipment which originated in New York, New York with a destination in Pampano Beach, Florida. Therefore, the use of the equipment to transport goods in interstate commerce was, at all times pertinent hereto, pursuant to Carolina's authorization and license as an interstate carrier and not pursuant to Pitt County's limited authorization as set forth above. Thus, insofar as this case is concerned, Pitt County was not an authorized carrier and was, in effect, an intrastate carrier; and, the legal issues are not affected by Pitt County's limited authorization to transport shipments of certain specified goods originating from certain specified geographical locations to other specified geographical locations.

ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

The basic and dispositive issue in this case is whether the indemnity provisions of the Trip Lease are void and

unenforceable as against public policy because those provisions violate a federal regulation issued by the Interstate Commerce Commission in the regulation of interstate commerce.

Relying on the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132 (1972), Pitt County contended that the indemnity provisions in the Trip Lease were void and unenforceable as against public policy because those provisions did violate such a regulation. Accordingly, Pitt County moved for judgment on the pleadings, and the United States District Court for the Eastern District of Virginia, also relying on the decision in *Alford* v. *Major,* and treating Pitt County's motion as a Motion for Summary Judgment, granted the motion and dismissed Carolina's claim for indemnity. On appeal, the United States Court of Appeals for the Fourth Circuit attempted to distinguish the instant case from the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* and after so doing reversed the district court's decision and remanded the case for trial.

Significantly, Carolina's Brief in Opposition actually eradicates the attempt of the decision below to distinguish this case from the decision in *Alford* v. *Major, supra,* and admits that Carolina's claim for indemnity cannot stand.

In its Brief in Opposition, Carolina admits that it is entitled to indemnity under the Trip Lease only if the driver of the leased vehicle is the agent of Pitt County while operating the leased vehicle. However, if the driver was Pitt County's agent in the operation of the leased vehicle, then both the driver and the leased vehicle were under the control of Pitt County, and if the driver and the leased vehicle were under the control of Pitt County for

the duration of the Trip Lease, Carolina has clearly violated the regulation.

The regulation is clear and mandatory. It requires that the Trip Lease "[s]hall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto by the lessee [here, Carolina] for the duration of said contract, lease or other arrangement. . . ." 49 C.F.R. § 1057.4(a)(4); see Appendix G at p. 29a.

Carolina's theory, and the decision of the United States Court of Appeals for the Fourth Circuit, assume that Carolina has complied with the regulation because the language on the front side of the Trip Lease states that Carolina is to be in exclusive possession, control and use of the leased equipment and that Carolina is to assume complete responsibility with respect to the possession, control and use of that equipment for the duration of the Trip Lease. However, that assumption is convincingly, if not irrefutably, rebutted by Carolina's argument in this Court that it is entitled to indemnity because Pitt County, not Carolina, was in complete control of the leased equipment through the driver.

Moreover, the decision below attempted to distinguish the decision in *Alford* v. *Major, supra,* because in that case the lessee "conceded a *prima facie* violation of the regulation in that the lessor had, in fact, retained full custody and control over the truck and driver during the term of the lease." *Carolina Freight Carriers Corp.* v. *Pitt County Trans. Co.,* 492 F.2d 243, 246 (4th Cir. 1974); see Appendix A at p. 8a. Carolina's argument in this Court completely eliminates the purported difference between this case and *Alford* v. *Major*, because Carolina's argument is a concession that Pitt County, the lessor, retained full custody

and control over the truck and driver during the term of the lease.

It is difficult to imagine how Carolina can be in exclusive possession, control and use of the equipment if the driver is, as Carolina asserts herein, Pitt County's agent and therefore under Pitt County's full and complete control. Similarly, it is difficult to imagine how Carolina can completely assume responsibility in respect to the possession, control and use of the leased equipment, if, as Carolina asserts here, the driver is Pitt County's agent and therefore under Pitt County's full and complete control. The answer is basic: Carolina cannot be in compliance with the regulation if the driver is Pitt County's agent and therefore under Pitt County's full and complete control.

Since Carolina's claim for indemnity rests upon the indemnity clause in the Trip Lease and since the indemnity clause applies only if the driver is under complete control of Pitt County, then clearly the indemnity clause must, of necessity, violate the regulation because the regulation requires Carolina to be in exclusive possession, control and use of the leased equipment and to assume complete responsibility in respect to the possession, control and use of the equipment. Under the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132, 135 (1972) and under the decision of the district court below, the indemnity provision must fall because to invoke it would permit a violation of the regulation. If the indemnity clause is not enforceable, Carolina's claim for indemnity must fail.

Carolina attempts to escape this inevitable result by asserting that, for purposes of providing a financially responsible defendant to the public, the driver is Carolina's agent and that since it has responded to an injured member of the public, the purpose of the regulation is fulfilled and there

is no bar to its claim for indemnity. However, that argument confuses the requirements of the regulation on the one hand with one of two important legislative purposes underlying the enactment of the statute under which the regulations were promulgated on the other.

By enacting 49 U.S.C. § 304(a)(3), Congress imposed on the Interstate Commerce Commission the duty "[t]o establish for private carriers . . . reasonable requirements to promote safety of operation . . . ." See Appendix G at p. 26a. Moreover, in 49 U.S.C. § 304(e)(2), Congress authorized the Interstate Commerce Commission, "with respect to the use by motor carriers (under leases, contracts or other arrangements) of motor vehicles *not owned by them,*" to issue "such other regulations as may be reasonably necessary in order *to assure that* while motor vehicles are being so used *the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles.*" 49 U.S.C. § 304(e)(2), see Appendix G at pp. 26a-27a (emphasis added).

It is clear that Congress considered highway safety to be of paramount importance and that Congress determined that highway safety would be best achieved if the carrier under whose authorization the non-owned equipment was being used had full direction and control of the leased vehicles and was fully responsible for the operation of the vehicles as if the authorized carrier was, in fact, the owner of the leased equipment. See *e.g., American Trucking Ass'ns.* v. *United States,* 344 U.S. 298, 301-06 (1953).

The ICC responded to the statute, and to the intent of Congress, by promulgating 49 C.F.R. § 1057.4(a)(4) which is almost verbatim the same as the language in the statute.

It is true that one important legislative purpose was

to insure that an injured member of the public would have recourse to a financially responsible defendant in the form of the authorized carrier which could be required by the ICC to procure liability insurance inuring to the benefit of injured members of the public. However, the paramount purpose of Congress in enacting 49 U.S.C. § 301, *et seq.*, was to insure highway safety and in order to accomplish this purpose Congress sought to put an end to a practice which had, in the past, defeated the paramount purpose of highway safety. *See, American Trucking Ass'ns.* v. *United States, supra,* at 304-06; *Alford* v. *Major,* 470 F.2d 132, 135 (7th Cir. 1972).

Before the statute was enacted, authorized carriers avoided compliance with ICC regulations by delegating responsibility for compliance with those regulations to small unauthorized carriers which were not subject to ICC regulation. To eliminate this practice Congress authorized the ICC to require the carriers, under whose authorization the equipment was to be used, to be fully responsible for the leased equipment and for its operation. If Carolina's contention that the driver is under Pitt County's control, rather than under Carolina's control, is allowed to prevail, then Pitt County is in complete control of the leased equipment, and Carolina, by delegating responsibility for compliance with the ICC regulations to Pitt County will be permitted to engage in one of the practices which Congress sought to eliminate by enacting the statute upon which the regulation is based.

An examination of the entire Trip Lease confirms that Carolina has indeed attempted to shift its responsibility to Pitt County and that the indemnity provision is simply the final step in the process.

First, Carolina ostensibly complied with the regulation by inserting the regulatory language to the effect that it

leased the equipment "for its exclusive possession, control and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Lease Agreement . . . ." *See* Replacement Appendix F at p. 2.

Then, on the reverse side of the lease, Carolina negated bit by bit, its ostensible compliance with the regulation. For example, paragraph 7 of the reverse side of the Trip Lease requires Pitt County, not Carolina, to maintain the equipment in accordance with ICC safety regulations, to maintain the records required by the ICC, and to keep the equipment in good operating order. Paragraph 9(b) requires Pitt County, not Carolina, to pay all fines, costs and expenses incurred in the operation of the vehicle for the duration of the Trip Lease. Paragraph 12 requires Pitt County, not Carolina, to insure that the driver is qualified in accordance with the ICC regulations. Finally, paragraphs 9(c), (d), (e) and (f) establish a comprehensive indemnification scheme by which Carolina insulates itself from any real responsibility for the operation of the vehicle.

These paragraphs serve not only to illustrate the extent to which Carolina has sought to put the real responsibility of complying with ICC regulations on Pitt County, but also to underline the fact that contractual recitation on the front page of the lease, by which Carolina purports to assume full control of the vehicle and driver, is nothing but a facade. The Trip Lease was a form document prepared by Carolina. If Pitt County was to lease its equipment to Carolina, it was required to do so under the terms of Carolina's lease or not at all. Thus, in order to lease its equipment, Pitt County was required to acquiesce in the facade.

Indeed, Carolina's argument that it is entitled to indemnity because the driver was Pitt County's agent in the operation of the vehicle is nothing more than an admission that its ostensible compliance with the Interstate Commerce

Commission regulations on the front page of the lease was a mere formality.

However, the lessee's claim for indemnity based upon this same contention was explicitly rejected by the district court in *Alford* v. *Major,* 314 F.Supp. 979 (N.D. Indiana 1970), wherein the court held that:

> "Major [here, Carolina] will not be permitted to escape liability by pleading that his compliance with the regulations of the Interstate Commerce Commission was a mere formality, and that control was in fact exercised by Carriers [here, Pitt County]. The Court therefore holds that the indemnity agreement in this lease between Major and Carriers is void as contrary to public policy." *Id.* at 983.

Major appealed the district court's decision and in *Alford* v. *Major,* 470 F.2d 132(7th Cir. 1972), the Court of Appeals affirmed the trial court's decision and held that the indemnification clause in the Trip Lease was unenforceable. On appeal, Major, as does Carolina in this case, contended that the only purpose of the ICC regulations was to tender a financially responsible defendant to the public and that the indemnification clause did not infringe upon that purpose. The Court specifically rejected this argument holding that:

> ". . . Major [here, Carolina] has misunderstood the policy behind these regulations. While it is true that one of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public, this was certainly not the exclusive purpose of the regulatory scheme. Indeed, highway safety must be considered to have been one of the paramount goals. As we have seen, the regulations call for the inspection of non-owned equipment by the authorized carrier when he takes possession as well as the testing of the driver's familiarity with various

> federal highway safety regulations. Thus, as the district court held, *'the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.'" Id.* at 135 (emphasis added).

Major then asserted, as does Carolina in this case, that actual control of the leased equipment was in the lessor [here, Pitt County] through its driver. The Court specifically rejected this contention and stated that:

> "Major's argument [like that of Carolina in this case], of course proceeds from the premise that the actual care custody and control of the truck remained with the lessor [here Pitt County] through its driver during the period of the trip lease. Major's related suggestion that the regulations have tacitly acknowledged the practicalities of this situation runs counter to the principal thrust of those regulations. When carefully analyzed, Major's argument would permit the 'practicalities' to override one of the central purposes of the regulations; namely, the prevention of traffic accidents from interstate truck leasing operations. *Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable." Id.* (emphasis added).

The Court of Appeals for the Seventh Circuit in *Alford* v. *Major, supra,* recognized what the Court of Appeals for the Fourth Circuit in this case has failed to recognize: that the indemnity provision applies only if actual care, custody and control of the leased vehicle remained with the lessor [here, Pitt County] through its driver and that if the actual care, custody and control remained with the lessor

rather than with the lessee as required by the Interstate Commerce Commission regulations then the lessee [here, Carolina] is permitted to circumvent the regulation. Therefore, the indemnity provision is void and unenforceable because it is in direct conflict with the regulation.

The pleaded facts in this case are almost identical to the facts before the court in *Alford*. In both cases, the party required to do so by the ICC has executed a *pro forma* assumption of responsibility for the equipment and driver, but in each case, the lessee [here, Carolina] has attempted to shift the responsibility for complete control of the truck and driver to the lessor [here, Pitt County]. That responsibility is imposed upon the lessee [here, Carolina] by federal regulations having the force and effect of law and cannot be avoided by a contractual provision which conflicts with, and actually defeats, the very purpose of the regulation. Moreover, in each case, the device for attempting to avoid that responsibility is the same. The Trip Lease seeks to make the driver the employee of the lessor [here, Pitt County], and then, by way of the indemnification clause, seeks to make the lessor responsible for the acts of the driver. It is this device that frustrates the federal regulation. The final step in the process is the indemnification clause which shifts the ultimate responsibility of complying with the regulation to the lessor in direct violation of the federal regulation. Accordingly, the indemnification clause is unenforceable.

This is the clear and unmistakable holding in the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major, supra*. The decision of the United States Court of Appeals for the Fourth Circuit must necessarily be in direct conflict with the decision in *Alford* v. *Major, supra*, because the decision of the United States Court of Appeals for the Fourth Circuit holds that

the indemnification provisions are not facially violative of the regulation. Yet, because the indemnification provisions become operative only if the driver is the agent of Pitt County, and therefore under its full and complete control in the operation of the leased vehicle, the indemnification provision is, in fact, facially violative of the regulation which requires that full and complete control of the operation of the vehicle be maintained by Carolina.

The only other possible construction of the decision below is that Carolina is entitled to indemnity because it was in full custody and control of the leased equipment. However, since the indemnity provision does not operate if the driver is the agent of Carolina and since Carolina admits that its claim for indemnity exists only if the driver is Pitt County's agent, that cannot be the meaning of the decision of the United States Court of Appeals for the Fourth Circuit. Thus, that court's decision must proceed from the premise that a provision which becomes operative only if the driver, and the equipment through the driver, is under the complete control of Pitt County is not in direct conflict with the regulation which requires that such control be in Carolina. Thus, the Court of Appeals for the Fourth Circuit has decided that simply because Carolina has fulfilled one of the two purposes underlying the enactment of the regulations and the statute by responding to an injured member of the public, the regulation can thus be waived.

Therefore, when carefully analyzed, the decision of the United States Court of Appeals for the Fourth Circuit in this case is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major, supra.* This conflict exists as to an important question of federal law relating to the regulation of interstate commerce. Trip leases and indemnification clauses

such as those contained in the instant case are common throughout the trucking industry. The parties to those leases should not be left to guess at whether such a contractual provision is valid.

CONCLUSION

Accordingly, for the reasons stated herein and in the Petition for a Writ of Certiorari, it is respectfully requested that this Court, in the exercise of its discretion, grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

/s/ ALEXANDER H. SLAUGHTER

JAMES L. SANDERLIN
ALEXANDER H. SLAUGHTER
ROBERT E. PAYNE
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
Counsel for Petitioner, Pitt County Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply to Brief in Opposition were mailed, postage prepaid, to Edward A. Marks, Jr., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Richmond, Virginia 23219, counsel for respondent Carolina Freight Carriers Corporation, and to James W. Morris, III, Browder, Russell, Little, Morris & Butcher, 1510 Ross Building, Richmond, Virginia 23219, counsel for respondent Old Republic Insurance Company, on this 30th day of September, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States and that all parties required by law to be served have been served.

ALEXANDER H. SLAUGHTER